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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, ET AL.,

Respondents,

and

JENNIFER GRATZ and PATRICK HAMACHER

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL URBAN LEAGUE, THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF LOS ANGELES, AND THE NATIONAL RAINBOW/PUSH COALITION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

NATIONAL URBAN LEAGUE ("NUL")

Founded in 1910, NUL is the oldest and largest community-based movement devoted to empowering African-Americans to enter the economic and social mainstream. NUL seeks to accomplish its mission by ensuring that African-American children are well-educated and equipped for economic self-reliance; by helping adults attain economic self-sufficiency through good jobs, homeownership, and entrepreneurship; and by guaranteeing civil rights through the eradication of barriers to equal participation in society. In keeping with its mission, NUL supports race-conscious admissions policies at colleges and universities that, as part of the overall mission of higher education institutions to promote academic diversity, seek to ensure the meaningful representation in classrooms and on campuses of qualified African-American students.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF LOS ANGELES ("SCLC-LA")

The mission of SCLC-LA is to promote the philosophy of Dr. Martin Luther King, Jr. SCLC-LA believes that social change can be accomplished through racial understanding, and that, in turn, racial understanding can be

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for amici has made a monetary contribution to the preparation and submission of the brief.

achieved through greater racial diversity in higher education.

THE NATIONAL RAINBOW/PUSH COALITION ("RPC")

RPC seeks to move the nation and the world toward racial justice and harmony. Founded by the Rev. Jesse L. Jackson, RPC derives its strength from the nation's racial and ethnic diversity. It supports efforts of higher education institutions to tap into that diversity as a means of enhancing the richness and quality of the learning environment.

SUMMARY OF ARGUMENT

The pivotal question before this Court is whether, twenty-five years after *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), race still maters in American life. Petitioners claim that it does not, and ask this Court to repudiate Justice Powell's ruling in *Bakke* that universities can consider race as one factor in student admissions as a means of achieving their overarching interest in fostering a rich and diverse learning environment on campuses and in classrooms. Justice Powell was right. Race mattered then, and it still matters today. Overwhelming social science evidence that went unchallenged by Petitioners provides a strong empirical foundation for what Justice Powell believed to be the self-evident proposition that, because race does matter, greater racial diversity in the learning environment in higher education enhances the quality of the learning environment itself and redounds to the benefit of society as a whole.

Race continues to be salient in American life because racial differences continue to shape our experiences and perspectives. These differences often manifest themselves them in a troubling racial divide, particularly in K-12 public education. The reasons for the divide are many. But whatever the cause, racial disparities inevitably shape our experiences and perspectives. Race-conscious admissions policies that seek to foster a diverse learning environment do not assume, however, that the continued salience of race shapes a uniform black viewpoint. The policies assume only that race shapes the experiences and perspectives of all blacks in some way, not in the same way.

To say that race shapes experiences and perspectives so as to enable a person to contribute towards the enhancement of the learning environment in higher education is not a normative judgment about that person's character or worth. Indeed, the assumption that racial diversity makes a difference in the learning environment can teach the valuable moral lesson that race has nothing to do with character or worth.

The United States tenders no analysis in support of its argument that this Court should decide these cases solely on the ground that so-called "percentage plans" for student admissions are an efficacious race-neutral means of fostering a racially diverse learning environment in higher education. The only facts that the United States cites are raw statistics that it asks this Court to accept at face value. When scrutinized, however, the statistics do not point the rosy picture of minority enrollment in the percentage plan states that the United States paints.

The United States also glosses over a battery of other transparent flaws in the percentage plans that cast

substantial doubt on whether they are efficacious alternatives or even race-neutral to begin with. The United States fails to consider the risk that percentage plans may dilute the quality of the student body because they guarantee admission based solely on one factor, high school class rank, to the exclusion of all other criteria to which colleges and universities traditionally look in assessing whether an applicant is prepared for, and can contribute to, a challenging learning environment. The United States also fails to consider that percentage plans impose costs on society because their dependency on the de facto segregation of high schools has the effect of condoning and perpetuating the racial divide in K-12 public education. And the United States fails to consider whether the percentage plans actually are race-conscious under the basic tenet of constitutional law that an ostensibly race-neutral measure is race-based if it is intended to have a racially identifiable impact.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONERS' ARGUMENT THAT RACE NO LONGER MATTERS IN AMERICAN LIFE AND REAFFIRM THE PROPOSITION, WHICH WAS SELF-EVIDENT TO JUSTICE POWELL IN *BAKKE* AND WHICH STILL RINGS TRUE TODAY, THAT BROADER RACIAL DIVERSITY IN THE STUDENT BODY IN HIGHER EDUCATION ENHANCES THE LEARNING ENVIRONMENT AND LEADS TO PROFOUND SOCIETAL BENEFITS.

At bottom, Petitioners' arguments are driven by a single proposition: race no longer matters in American life.

(Pet. Br., *Gratz*, at 15.) Petitioners thus proclaim that there is no need for colleges and universities to consider the race of applicants in their admissions processes, and no need for institutions of government to consider race for any purpose. Petitioners' notion that race has become irrelevant has no grounding in reality.

A. Social Science Evidence That Went Unchallenged Provides A Strong Empirical Foundation For The Premise Of Justice Powell's *Bakke* Opinion That, Because Race Matters in American Life, Expanding Racial Diversity In Colleges And Universities Will Expand The Richness And Quality Of The Learning Environment There And Produce Benefits For Society As A Whole.

For a quarter of a century, our nation's higher education institutions have been guided by Justice Powell's opinion in *Bakke*, which held that colleges and universities may consider the race of applicants as one of many factors in admissions decisions to achieve the overarching interest in fostering a rich and diverse learning environment in higher education. *Bakke*, 438 U.S. at 312-13.

The premise of Justice Powell's *Bakke* opinion was a simple one: race matters in American life. Indeed, to Justice Powell, that proposition stated the obvious. Given the central importance of race in our society, Justice Powell believed that race inevitably shaped the experiences and perspectives that students bring with them to the campus and classroom. Because race matters, Justice Powell reasoned that broader racial diversity in the learning environment in higher education was bound to lead to broader diversity in the learning environment

itself. And because race matters, he also reasoned that greater racial diversity in the learning environment would redound to the benefit of society as a whole by exposing students to the talents and views of persons from all walks of life, by dismantling stereotypes and preconceptions, and by conveying fundamental lessons about tolerance and understanding – lessons that students could apply and impart in their daily lives after graduation. *Id.* at 312-13, 316.

The pivotal question confronting this Court in these cases is whether, twenty-five years after *Bakke*, race still matters. Petitioners claim that it does not, and ask this Court to repudiate Justice Powell's *Bakke* opinion.[2] This Court should decline to do so. Justice Powell was right. Race mattered then, and it still matters today.

Petitioners' assertion that race no longer matters is truly remarkable in the face of the overwhelming social science evidence presented in these cases. *See The Compelling Need for Diversity in Higher Education*. This evidence, which Petitioners did nôt challenge, leaves no room for doubt that race matters. It provides a strong empirical foundation for what Justice Powell believed to be the self-evident proposition that greater racial diversity in the learning environment in higher education enhances the quality of the learning environment itself and produces significant benefits to society as a whole. In short, the

[2] The United States does not join Petitioners' call for the repudiation of Justice Powell's *Bakke* opinion and the rejection of his premise that race matters in American life. Petitioners are, however, joined by several other amici, including Ward Connerly, Pacific Legal Foundation, and the Center for Equal Opportunity.

evidence makes a powerful case for race-conscious admissions in our colleges and universities.[3]

The conclusions reached in the social science evidence presented in these cases are not aberrational. "One of the most consistent findings of social research and government statistics in the United States is that race does make a difference and the differences are often profound." Gary Orfield, *Introduction to Diversity Challenged: Evidence on the Impact of Affirmative Action*, 13 (2001).

B. Race Continues To Be Salient Because Racial Differences Shape Our Experiences And Perspectives.

The continued salience of race is not categorically bad, or a sign that we are hopelessly mired in a great "American dilemma" about race. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944). In fact, there are ample reasons to

[3] The evidence includes an expert report submitted by William G. Bowen, formerly the President of Princeton University and now the President of the Mellon Foundation. Bowen has devoted years of study to the subject of the impact of racial diversity in higher education. His earlier work greatly informed Justice Powell's *Bakke* opinion. For Justice Powell, it was more than enough that leading educators such as Bowen had reached the considered judgment that because race shapes the experiences and perspectives of students, efforts to promote racial diversity in higher education would expand the diversity of the learning environment to the betterment of all. *Bakke*, 438 U.S. at 313 n.48. More recently, Bowen, along with Derek Bok, the former President of Harvard University, co-authored *The Shape of The River* (1999), a pathbreaking study (summarized in Bowen's expert report) that demonstrates the continued validity of Justice Powell's *Bakke* opinion and the continued salience of race in American life.

embrace racial differences. It is now firmly embedded in our social and political consciousness that the nation's diversity is a source of its strength. *See, e.g.*, Remarks of the President, Hispanic Heritage Month, Oct. 9, 2002, *available* at http://www.whitehouse.gov/newsreleases 2002/10/200021009-1.html; Rudolph W. Guiliani, *Combating Terrorism,* 16 N.D. J. L. Ethics & Pub. Pol'y 57, 62 (2002); *Hearing of the Foreign Operations, Export Financing, and Related Programs Subcommittee of the House Appropriations Committee* (Testimony of Secretary of State Powell), 107th Cong., 2d Sess. (Feb. 13, 2002).

In many respects, however, racial differences manifest themselves today in a deep and troubling divide. Despite the strides this nation has made over time in breaking down barriers to opportunity, we still see racial gaps in wealth, health, and employment.[4] Despite significant racial healing, we still see a dramatic disparity in the relative faith that blacks and whites place in government institutions and our legal process.[5] The racial divide even

[4] *See* Compelling Need, Report of Thomas J. Sugrue, at 39-46. *See also* Bernard E. Anderson, *The Black Worker: Continuing Quest for Economic Parity, in* National Urban League, *The State of Black America 2002*, 51 (2002) [hereinafter "*SOBA*"); Franklin D. Raines, *What Equality Would Look Like: Reflections on the Past, Present and Future, in SOBA 2002,* 13 (2002); Walter W. Stafford, *The National Urban League's Survey: Black America's Under-35 Generation, in SOBA 2001*, 19, 41 (2001); William D. Bradford, *Black Family Wealth in the United States, in SOBA 2000*, 103, 106-07 (2000); Billy J. Tidwell, *Parity Progress and Prospects: Racial Inequalities in Economic Well-Being, in SOBA 2000*, 287, 288 (2000).

[5] See Orfield, at 16; Compelling Need, Report of Thomas Sugrue, at 46-48; David A. Harris, *'Driving While Black' And Other African-American Crimes: The Continuing Relevance of Race to American Criminal Justice, in SOBA 2000*, 259, 261-63 (2000).

extends to the "perception of race itself as a salient feature in modern American society." Compelling Need, Report of Eric Foner, at 79.[6]

The reasons for the racial divide are many. But whatever the cause, the racial divide inevitably shapes our experiences and perspectives. *Id.* at 80. ("As long as the historic memory and current reality of racial inequality remain alive, so too will profound differences in how black and white Americans understand the nation's past, present, and future."); *id.*, at 237, Report of William G. Bowen (it is "a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background.").

1. The Educational Experience Of Students In Public Schools - From Kindergarten Through Twelfth Grade Diverges Along Racial Lines.

Experiences and perspectives are formed early on in primary and secondary education. Where we went to school, who was there with us, and what we learned influence who we are and how we interact with the world around us. Race plays a significant role in shaping these formative experiences and perspectives because race is salient to the make-up and quality of the nation's public schools, from kindergarten through twelfth grade.

[6] As Professor Foner has described this phenomenon, "most whites tend to think that race has only a minor impact on the daily experiences and future expectations of Americans whatever their background," whereas "[m]ost nonwhites feel that race still matters a great deal." Compelling Need, Foner Report, at 79.

K-12 educational experiences diverge along racial lines because the make-up of public schools commonly diverges along racial lines. Five decades after *Brown v. Board of Education*, 347 U.S. 483 (1954), de facto racial segregation of the nation's public schools is widespread. *See* Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society With Segregated Schools: Are We Losing The Dream?*, 4 (2003), *available* at www.civilrightsproject.harvard.edu [hereinafter "Frankenberg"].

For instance, 75% of black students attend predominately minority public schools (*i.e.*, schools that are more than 50% minority). 37% of black students attend public schools that are "intensely segregated" (*i.e.*, schools that are 90-100% minority.) And 1 out of every 6 black students attends public schools that are virtually all minority. *Id.* at 28, 31, 40.

Because public school students typically attend schools in their own neighborhoods, racial segregation in grades K-12 mirrors patterns of residential segregation and patterns of poverty that all too frequently engulf minority neighborhoods. *See* Compelling Need, Sugrue Report, at 27; Leland Ware and Antoine Allen, *The Geography of Discrimination: Hypersegregation, Isolation, and Fragmentation Within the African-American Community, SOBA 2002*, 69 (2002). For example, 1 out of 5 black students lives in 27 "central city" school districts in which the majority of the residents, who are predominately minority, live in poverty. *See* Frankenberg, at 53; *see also* Ware and Allen, *SOBA 2002*, 69 ("today's African Americans who reside in the nation's inner cities live in . . . extreme racial isolation. . . ."); U.S. Department of Education, National Center for Education Statistics, *Urban Schools: The Challenge of Location and Poverty*, 8, 11

(1996) (urban public schools are more likely to serve minority students and are more likely to be located in impoverished pockets of cities).

The racial divide in public school education in grades K-12 transcends region: the percentage of black students in predominately minority and intensely segregated schools has increased nationwide over the last decade. Frankenberg, at 38. This racial divide also transcends class: because "[r]esidential segregation has led to a concentration of poverty in urban areas," even middle class minority students in our cities have "direct experience with poverty and its consequences." Compelling Need, Sugrue Report, at 18. And the racial divide transcends the boundary between city and suburb: black exposure to white students in public schools in suburban districts has fallen since 1986, because many public schools in those districts have become increasingly minority as large numbers of minorities have moved from cities to suburbs. Frankenberg, at 61.

Public schools that are predominately minority are not *necessarily* inferior. *See Missouri v. Jenkins*, 515 U.S. 70, 119 (1995) (Thomas, J., concurring). The rub is that, "[w]ith few exceptions, separate schools are still unequal schools." Frankenberg, at 11. Compared to predominately white schools, there are fewer credentialed teachers, library books, and advanced placement courses in predominately minority schools; the facilities in minority schools are older and outmoded; parental involvement is less pronounced; and average student proficiency in reading and math is markedly lower. *See* U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2002*, 54 (2002); H.R. Rep. 107-063, 107th Cong., 1st Sess. (2001); General Accounting

Office, *Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area*, 17 (2002). These stark differences in the quality of K-12 public education further confirm the continued salience of race in American society.

It is telling that alleviating racial disparities in public education is among the core purposes of the federal government's most recent education initiative, The No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 425 (2001). This major legislation, which passed with strong bipartisan support, and which the President has described as a signature of his administration,[7] demonstrates that the nation's leadership understands that race is still salient.

2. Racial Differences In The Experience Of Public School Students From Kindergarten Through Twelfth Grade Shape The Perspectives Of Students In Higher Education Institutions.

Petitioners argue (Pet. Br., *Gratz*, at 41) that the academic diversity rationale for race-conscious admissions in higher education is "malleable." They claim that the true purpose of such policies is to remedy the historic societal discrimination that has engendered racial disparities in K-12 public education – a problem that is too amorphous to constitute a permissible predicate for race-based decisions.

[7] Remarks of the President on the First Anniversary of The No Child Left Behind Act, Jan. 8, 2003, *available* at http://www.whitehouse.gov/news/releases/2003/01/20030108-4.html.

See City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490-91 (1989). Petitioners' argument misses the point.

Certainly, there is a connection between racial disparities and diversity in higher education. But it exists only because life experiences invariably shape one's perspective. Thus, the neighborhoods in which students have lived and the schools that they have attended before arriving at college will necessarily affect their outlook once they get there. Given the indisputable racial disparities in neighborhoods and schools, those disparities are part of the experiences that students bring with them to campuses and classrooms. *See* Compelling Need, Sugrue Report, at 43 ("In large part because of pervasive racial separation in residence, education, and opportunity, minorities and white Americans experience significantly different qualities of life. As a result, individuals from different racial and ethnic backgrounds have different expectations and perspectives on some of the most fundamental aspects of day-to-day life.").

This is not to say that racial diversity in higher education can be advanced only by those blacks who have had first-hand experience with racial disparity through attendance at inferior, predominately black public schools in impoverished predominately black neighborhoods. The movement to higher rungs of American society is a recent occurrence for many blacks. An upper class black student who has attended an elite all-white private school in an exclusive all-white neighborhood may be only a generation removed from an all-black public school in an impoverished all-black neighborhood. Thus, the sting of disparity may still hit home for him. Even if the student has not suffered disparity himself, he may have a view about the disparities that affect other blacks, let alone a view of

what it was like not to know disparity as a black person in an elite all-white private school in an exclusive all-white neighborhood. Either way, the views of this student, just like the student who has lived and breathed racial disparity on a daily basis, can make an important contribution to the racial diversity of the learning environment. *See* Bowen and Bok, *The Shape of the River*, at 280 ("[M]inority students of all kinds can have something to offer their classmates. The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx.").

Petitioners argue that the academic diversity rationale for race-conscious admissions policies raises the specter that those policies will become a permanent feature of the landscape of higher education. (Pet. Br., *Gratz*, at 17.) That is a canard. To be sure, racial diversity is likely to be an important component of a quality learning environment in our colleges and universities for the indefinite future because race itself is likely to continue to matter. But that does not necessarily mean that race-conscious admissions policies will always be necessary to achieve the goal of racial diversity.

C. Race-Conscious Admission Policies That Seek To Foster Academic Diversity Do Not Presume That Race Shapes The Experiences And Perspectives Of All Persons Of A Particular Race In The Same Way.

Petitioners and several of their amici resort to the shop-worn claim that the academic diversity rationale for race-conscious admissions in higher education rests on a rigid presumption that all persons of a particular race

"think alike" and therefore will convey identical perspectives on each and every subject. (Pet. Br., *Gratz*, at 16; Amicus Curiae Br. of National Association of Scholars, at 12-13; Amici Curiae Br. of Center for Equal Opportunity, *et al.*, at 19-20.) That argument did not persuade Justice Powell in *Bakke*. It is no more persuasive now.

To be sure, race-conscious admissions policies that seek to foster diversity in higher education assume that all blacks share the experience of being black. But that assumption hardly means that all blacks think alike. It is no more reductionist than the assumption that all persons who grew up in rural America share the experience of growing up in rural America.

Beyond the initial assumption of a shared black experience, the crux of race-conscious admissions policies that seek to foster diversity is *individual* black experience – that is, each black person has his or her own sense of what it means to be black. Those policies thus assume only that race shapes experiences of all blacks in some way, not in the same way. Far from resting on the stereotypical notion that there is a single black view that all blacks share, race-conscious admissions policies in higher education work to break down those stereotypes. To take an obvious example, many blacks do not favor race-conscious admissions policies. But race-conscious admissions policies do not presume otherwise, and they welcome all voices, even ones that denounce the policies. Glenn C. Loury, *Foreword, in* William G. Bowen and Derek Bok, *The Shape of The River* (1999) at xxvii (race of minority opponents of affirmative action who "deny[] the relevance of race . . . helps to make relevant their denial").

The assumption behind race-conscious admissions policies is far more modest than the assumption behind the Federal Communication Commission's policies governing the race-conscious allocation of commercial broadcast licenses that were sustained in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Underpinning the FCC policies was the theory that expanding minority ownership of broadcast licenses would lead to more minority-oriented programming and more minority perspectives on radio and television. *Id.* at 590. In upholding the FCC policies, this Court distanced itself from the notion that there was a uniform minority viewpoint that all minority broadcasters would convey. *Id.* at 590-91. Nevertheless, the FCC policies did link the race of the owner of a broadcast license to the content of programming on the owner's station. Accordingly, the policies on their face were susceptible to the charge that they presumed that all minorities "think alike" in making their programming choices. *Id.* at 618 (O'Connor, J., dissenting); *id.* at 635 (Kennedy, J., dissenting).

The context of the FCC policies, commercial broadcasting, is also very different from the context of race-conscious admissions policies, higher education. As the dissenters in *Metro Broadcasting* saw it, the correlation between race and programming content was tenuous in commercial broadcasting because programming choices are "mediated by market forces" of viewer demands and tastes. *Id.* at 619 (O'Connor, J., dissenting). Any commercial radio or television station must respond to those forces if it wishes to "attract and retain audiences." *Id.* at 626. (O'Connor, J., dissenting). The majority agreed "that all station owners are guided to some extent by market demand in their programming decisions," but deferred to

the predictive judgment of the government "there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts." *Id.* at 580.

The debate over the power of viewer and listener preferences to overcome the salience of race in television and radio programming choices that divided the Court in *Metro Broadcasting* has little bearing on race-conscious admission policies in higher education, because there is nothing on college campuses quite like the mediating force of the market. Teachers and peers are, in a sense, the audience for student expression on campus and in classrooms. But students are not expected to shed their experiences and tailor their perspectives to meet the demands of that "market." To do so would be antithetical to the long and proud tradition of academic freedom in higher education, which trades in the currency of a robust exchange of ideas. *Bakke*, 438 U.S. at 312.

In the end, Petitioners, along with their amicus Ward Connerly, say that any presumption about the relative contributions that people of different races can make to the learning environment in higher education violates the axiom that race is irrelevant in assessing the worth of individuals. (Pet. Br. at 14.) Petitioners' invocation of that axiom is misplaced.

First, recognizing that race shapes experiences before college, and hence affects the contributions that a person can make to the learning environment once there, is largely a cognitive point about that person's understanding of herself and the world around her. It is not a normative judgment about her character or worth. "One can hold that race is irrelevant to an individual's moral worth, that

individuals and not groups are the bearers of rights, and nevertheless affirm that, to deal effectively with these autonomous individuals, account must be taken of the categories of thought in which they understand themselves." Loury, at xxix (1999).

Second, giving favorable consideration to an applicant's race in the admission process on the assumption that his experiences have been shaped by race and that those experiences therefore can add something to the learning environment is not a value judgment on the content of character, any more than the favorable consideration of an applicant's roots in a rough and tumble part of rural America is a judgment that his character has more content than the applicant who was reared in an affluent suburb.

Finally, the assumption that race makes a difference in the learning environment in higher education actually can teach the valuable moral lesson that race has nothing to do with character or worth. *Id.* at xxix ("Conveying effectively the ultimate moral irrelevance of race in our society may require fundamental attention by [higher education institutions] to the racial composition of the learning environment.").[8]

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[8] As an extension of his assertion that race does not matter in American life, amicus Connerly is the primary sponsor of The Racial Privacy Initiative, a state-wide ballot measure in California that would prohibit government agencies from collecting any statistics about race or ethnicity. *See* http://www.racialprivacy.org. If successful, this initiative would disable the state from assessing whether and to what extent that there are disparities between blacks and whites in employment, income, wealth, access to health care, and the frequency of police

(Continued on following page)

II. THE UNITED STATES FAILS TO TENDER ANY ANALYSIS TO SUPPORT ITS ARGUMENT THAT THIS COURT SHOULD DECIDE THESE CASES SOLELY ON THE GROUND THAT "PERCENTAGE PLANS" FOR COLLEGE ADMISSIONS PROVIDE AN ALTERNATIVE MEANS OF ACHIEVING A RACIALLY DIVERSE LEARNING ENVIRONMENT THAT IS BOTH EFFICACIOUS AND RACE-NEUTRAL.

The United States does not join the Petitioners in asking this Court to repudiate Justice Powell's *Bakke* opinion and hold that race no longer matters in higher education admissions. Instead, the United States asks this Court to decide these cases solely on the ground that so-called "percentage plans" for admissions are both an efficacious and a race-neutral means of achieving the interest in a racially diverse learning environment in higher education that demonstrate that race-conscious

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traffic stops. More relevant here, the initiative would impair the ability of state higher education institutions to determine whether facially neutral admissions criteria have a discriminatory impact on minorities because the prohibition on collecting information on race or ethnicity would make it impossible for the college to comprehend fully the racial make-up of the applicant pool. The upshot of this quest for total desensitization to race is that higher education institutions could not even pursue the first line of attack in eliminating racial disparities: to "identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity." (U.S. Br., *Grutter*, at 17.) The regime envisioned by Connerly would eliminate racial differences, at least on paper, because there would be no meaningful way to evaluate whether racial differences exist. A ruling from this Court that race may no longer be considered in college admissions would lend cover to such schemes to remove race from the equation for any and all purposes.

admissions policies are not narrowly tailored to the interest and therefore are unconstitutional.

The United States' treatment of percentage plans is transparently superficial. With no supporting analysis, the United States declares the percentage plans to be both efficacious and race-neutral. The only facts the United States cites are raw statistics purporting to show that minority enrollment in public higher education institutions in the three states with percentage plans – Texas, Florida, and California – is equal to, in or excess of, minority enrollment in those states prior to the elimination of race-conscious admissions policies there. (U.S. Br., *Grutter*, at 17-22.) The United States says that the statistics speak for themselves and asks this Court to accept them face value. When scrutinized, however, the statistics do not paint the rosy picture that the United States paints. *See* Catherine L. Horn and Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis, at 50-51 (Feb. 2003), *available* at http://www.civilrightsproject harvard.edu.

Wholly apart from the serious concerns raised by its insistence that this Court should decide these cases on the basis of raw statistics that do not tell the story the United States wishes they did, the United States glosses over a battery of other transparent flaws that cast substantial doubt on whether the percentage plans are efficacious or are even race-neutral to begin with.

A. The United States Fails To Consider The Risk That Percentage Plans, Like Quotas, May Dilute The Quality Of The Student Body In Our Colleges And Universities.

The percentage plans guarantee admission to a higher education institution based on a single factor: high school

class rank. In their unwavering and mechanical reliance on one factor, the percentage plans bear a strong resemblance to racial quotas. And just like quotas, the plans may sacrifice the quality of the student bodies at our colleges and universities. The risk is inherent in the way that percentage plans treat class rank as a proxy for qualification. Ironically, the percentage plans actually may impose a greater threat to the quality of the learning environment in higher education than now-outlawed racial quotas ever did. At least under the quota system held unconstitutional in *Bakke*, factors besides race were assessed in making admissions decisions for those positions reserved for minorities: candidates had to compete against each other based on grades, test scores, and other criteria. By contrast, the percentage plans jettison every factor but one – high school class rank.

Colleges and universities typically evaluate the strength of an applicant's high school. An applicant with weaker grades at an intellectually challenging school may be more qualified for admission than an applicant with stronger grades at a less intellectually challenging school. In the same vein, an applicant with weaker grades who had to work during high school to help out his family or has made notable contributions to his school or community may be more qualified for admission than an applicant with stronger grades, but who had an easy ride through high school or who did not participate in extracurricular activities. None of these considerations matters under the percentage plans. The only thing that counts towards guaranteed admission to some college is high school class rank.

That percentage plans threaten to dilute the quality of the study body through their reflexive guarantee of admission to anybody who finishes above a certain mark in a

high school holds true whether the school is predominately minority or predominately white. In either case, graduating in the upper percentile of a class may not be difficult because the school's academic programs or the competition from classmates are not rigorous. And yet, the relative rigor of schools is irrelevant under the percentage plans: someone in a top percentile at a lesser school gains admission to a college based only on class rank, and that student's admission could close the door of that college to a more qualified student, white or black, from a better school.

Race-conscious admissions policies that consider race as one factor among many in the admissions process do not compromise quality. Under those policies, nobody is admitted or excluded based on any single factor. They represent a balanced and nuanced approach that seeks to admit only students who have the qualifications to compete in, and contribute to, the learning environment, based on a myriad of factors.

The record in these cases illuminates the risk that percentage plans may dilute the quality of the student body in colleges and universities. According to the uncontroverted expert testimony of William G. Bowen, the President of the Mellon Foundation: "So long as high schools differ so substantially in the academic abilities of their students and the level of difficulty of their courses, treating all applicants alike if they finished above a given high school class rank provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions" Compelling Need, Bowen Report, at 240.

Subsequent studies have reinforced Bowen's concern. For example, one report found that the number of black

students at Texas' three most selective universities who graduated from challenging high schools in the state declined under the Texas percentage plan in 1999-2001. The study also found that black students who graduated from less challenging Texas high schools attended the three selective higher education institutions at the same rate under the percentage plan as they did under the previous admissions system in which race was considered.[9] Although the authors caution against drawing broad conclusions from this data, their findings suggest that the percentage plan is working to the detriment of black students who attend challenging high schools, but who do not make the class standing cut.

Texas' own report card on its percentage plan shows that standardized test scores of black and Hispanic students admitted in 1999-2001 under the Texas percentage plan are nearly 100 points lower than the scores of black and Hispanic students admitted outside the plan.[10] The validity of standardized tests as an indicator of qualifications for admission to higher education is disputed. *See* Compelling Need, Report of Claude M. Steele. But if the tests are valid, then Texas' report card suggests that blacks who are less qualified than other blacks are being admitted under the percentage plan in Texas.

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[9] John F. Kain and Daniel M. O'Brien, Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates 8, 38 (2002) *available* at http://www.utdallas.edu.research/greenctr.

[10] See Gary M. Lavergne and Bruce Walker, Implementation and Results of the Texas Automatic Admissions Law, 18-20, *available* at http://www.utexas.edu/studentresearch/reports/admissions/hb.588.report_.

Because analysis of the impact of the percentage plans is only just beginning, it remains an open question whether the plans are diluting the quality of the student body at colleges and universities in the percentage plan states. At a minimum, that question must be considered before the plans can be deemed the *raison d'etre* for holding race-conscious admissions policies unconstitutional, as the United States blithely assumes.

B. The United States Fails To Consider That Percentage Plans Impose Costs On Society Because Their Dependency On De Facto Segregation In High Schools Has The Effect Of Condoning And Perpetuating The Racial Divide In K-12 Public Education.

The United States also fails to consider the potential societal costs that flow from the dependency of percentage plans on the de facto racial segregation of public high schools. The de facto racial segregation that characterizes much of K-12 public education in this country is particularly acute in the percentage plan states of California, Florida, and Texas. In California, 37% of black public school students attend intensely segregated schools. In Florida and Texas, about 1/3 of black public school students attend intensely segregated schools. Horn and Flores, at 27. The public schools in all three states are among the most racially segregated in the nation. Frankenberg, at 50.

The implications of the de facto racial segregation of public schools in California, Florida, and Texas are no mystery: (i) the top ranked students in graduating classes in scores of public high schools in those states are minority

because those schools are predominately or nearly all minority; and (ii) the percentage plans guarantee this contingent of students admission to higher education institutions in the three states solely by virtue of their high school class rank. As a practical matter then, it is de facto racial segregation that fuels the percentage plans by providing a large and steady supply of racially identifiable high schools that serve as feeders of minority students to higher education institutions in the percentage plan states.

This synergy between de facto racial segregation and percentage plans is perverse. A central imperative of our times is that racial disparities in K-12 public education must be resisted, not tolerated. The percentage plans conflict with that imperative because they prop up a racial divide: their success turns on the continued existence of racial disparities in K-12 public education. In racially integrated high schools, minorities are underrepresented in the top ranks of graduating classes, and so without the de facto racial segregation to ensure minority placement in top ranks of graduating classes, the percentage plans cannot work. *See* Mark C. Long, *Race And College Admission: An Alternative to Affirmative Action*, 41-48 (2002), *available* at http://home.gwu.edu/marklong; Kain and O'Brien, at 4.

In their amicus brief in support of Petitioners (at 10-16), the State of Florida and its Governor suggest that reforms to K-12 public education to alleviate racial disparities complement percentage plans in higher education. It can hardly be disputed that inferior K-12 public education is a root cause of minority underrepresentation in higher education, and that efforts to improve the quality of predominately minority public schools will better prepare

minority students for college. In turn, this will reduce the need for colleges and universities to maintain race-conscious admissions policies to achieve a racially diverse learning environment. Florida's K-12 reform program and the federal government's analogous No Child Left Behind initiative are steps in that direction. But those measures are in their nascent stages. *See* U.S. Department of Education, Executive Summary of The No Child Left Behind Act (required proficiency levels in reading and math are to be reached in 12 years). More fundamentally, alleviating the racial divide in K-12 public education is a major undertaking that requires a steep financial commitment – a commitment that may be difficult to sustain in a time of severe fiscal retrenchment at the state and local level. *See* Joetta L. Stack, *'No Child' Law Vies for Scarce Resources*, Education Week, Jan. 8, 2003.

In sum, there is much to be done before we can declare victory in the campaign to improve K-12 public education. See Statement of President George W. Bush Upon Signing H.R.1, 38 Weekly Comp. Pres. Doc. 26 (January 8, 2002) (No Child Left Behind Act is "just the beginning of change"). Until then, K-12 reforms, either alone or in tandem with percentage plans, are not efficacious substitutes for race-conscious policies designed to achieve a racially diverse student body that will enhance the quality of the educational environment, not dilute it.

C. The United States Fails To Consider Whether The Percentage Plans Actually Are Race-Conscious Because They Were Intended To Have A Racially Identifiable Impact.

The United States labels the percentage plans race-neutral, but calling the percentage plans race-neutral does

not make them so. There are credible arguments that the plans are actually race-conscious – arguments that the United States does not consider.

It is a basic tenet of constitutional law that an ostensibly race-neutral measure that is intended to have a racially identifiable impact is not neutral. *Village of Arlington Heights v. Metropolitan Housing Auth.*, 429 U.S. 252 (1977). The percentage plans arguably fall within the ambit of that tenet. While the plans may look facially neutral because many white students in the top ranks of predominately white high schools also stand to benefit, the primary purpose of the plans apparently is to capture a sizeable and racially identifiable subset of students in the top ranks of racially segregated high schools. *See* Lavergne and Walker, at 2; Horn and Flores, 15, 17, 18.

Notwithstanding the tenet that a facially neutral law that is designed to have discernible racial effects may be deemed race-based, preferences for small or new businesses are thought of as legitimate race-neutral alternatives to preferences for minority businesses, even if the government knows that a substantial subset of beneficiaries will be minority-owned businesses. *Croson*, 488 U.S. at 507; *id.* at 526 (Scalia, J., concurring). But that safe harbor of race-neutrality may not be availing to percentage plans. The demographics of de facto racial segregation in public high schools make it easy to ascertain the racial composition of a public high school. Indeed, the drafters of the percentage plans need only have looked to the boundaries of public school districts and the locations of the schools within them in order to calculate with a fair degree of precision the dimensions of the minority subset of public high school students in the top ranks of their class. Viewed

in that light, the percentage plans look like the gerrymandering of voting districts to create an intended impact of including or excluding voters along racial lines – ostensibly race-neutral measures that this Court has viewed with deep suspicion. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

The common thread is that the racial impact of both percentage plans and racial gerrymandering can be readily identified geographically. By contrast, the subset of small or new businesses that are minority-owned cannot – that group of businesses may be dispersed and located in many neighborhoods. Furthermore, determining whether a minority-owned business even qualifies for a preference for small and new businesses requires the compilation of information about the size, resources, and age of that business.[11]

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[11] Even if the percentage plans are race-neutral, and even if they are efficacious for some institutions, the United States stumbles in offering the plans as a one-size-fits all prescription for every institution in the land. If the percentage plans make any sense at all, they work best at state institutions that recruit the bulk of their students from in-state. In its blunderbuss approach, United States ignores the fact that the applicant pool for admission to some of the country's top public institutions, including the University of Michigan, is national in scope. The United States also fails to explain how the percentage plans begin to speak to the admissions policies of private institutions that recruit students from beyond the boundaries of the states in which they are located. Horn and Flores, at 10. Finally, the United States blindly touts the percentage plans in its brief in *Grutter*, a case involving race-conscious admissions in a law school, even though percentage plans have not been applied to graduate and professional schools.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals in Case No. 02-241, and affirm the judgment of the district court in Case No. 02-516.

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